

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID R. RODRIGUEZ

Claimant

VS.

MOBILE RADIO SERVICE, INC.

Respondent

AND

CONTINENTAL WESTERN INS. CO.

Insurance Carrier

Docket No. 1,047,506

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 15, 2010, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Norman R. Kelly, of Salina, Kansas, appeared for claimant. James M. McVay, of Great Bend, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant sustained his burden of proof of personal injury by accident arising out of and in the course of his employment with respondent. The ALJ ordered respondent to pay claimant's medical expenses incurred to date as authorized medical expenses and designated Dr. Paul Pappademos to be claimant's authorized treating physician. Further, respondent was ordered to pay claimant temporary total disability benefits if claimant is taken off work by Dr. Pappademos.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 3, 2009, Preliminary Hearing and the exhibits and the transcript of the deposition of Dr. John Babb taken February 8, 2010, together with the pleadings contained in the administrative file.

ISSUES

Respondent contends that claimant did not suffer an increase in pain or symptoms from his alleged accident of July 24, 2009, and this incident was not the cause of claimant's need for a total knee replacement. Respondent argues, therefore, that the ALJ

exceeded his authority in finding that claimant's injuries arose out of and in the course of his employment. Further, respondent contends that the act of stepping over a three to four inch object in a parking lot is a personal risk associated with all members of the public and is not related to claimant's employment.

Claimant asserts that the order of the ALJ should be affirmed. He argues the evidence in the record proves that his accident in July 2009 aggravated his right knee condition and caused him to require further medical treatment, including right total knee replacement. Claimant further argues that his injury stemmed from a hazard of his employment, *i.e.*, tripping over a parking block.

The issues for the Board's review are:

(1) Did claimant's current injuries and need for treatment result from an accident that arose out of and in the course of his employment with respondent?

(2) Was claimant's act of stepping over a parking block in a parking lot a personal risk or a risk associated with all members of the public?

FINDINGS OF FACT

Claimant testified that on Friday, July 24, 2009, while delivering a quote to a potential client, he tripped over a parking block in the parking lot. Although he did not fall, he heard and felt his right knee pop. After the stumble, he composed himself and continued to visit with the client about the quote. He did not discuss his accident with his potential client. He testified that he had continuous pain in his right knee that Friday, Saturday, Sunday and Monday. Claimant admitted he did not inform respondent about his accident the day it occurred. Nor did he report the injury on Monday, although he had a meeting with his employer that morning.

At about 6 a.m. Tuesday morning, claimant prepared an email directed to respondent reporting his work-related injury. He did not send the email, however, as he had a meeting with respondent's owner/manager. At the meeting, claimant was put on a straight 50 percent commission rather than a base plus 20 percent commission. After claimant attended the meeting, he finished the email and sent it.

Claimant admitted that he sent respondent an email stating that he had not planned to turn his claim in to workers compensation but because he lost his health insurance, he decided it would be in his best interest to make a claim. Claimant said that he was told by someone at respondent that it did not like workers compensation claims, so he was a little worried to turn in a claim.

Claimant testified that later that week he asked respondent if it had a specific doctor he needed to go to. He said respondent said it did not, so claimant saw his personal

physician, Dr. R. Alan Snodgrass. Claimant was later referred to Dr. Kenneth Jansson, who saw him on September 2, 2009. Dr. Jansson questioned claimant's history and stated that he thought "this is probably just an exacerbation of his pre-existing osteoarthritis condition."¹

Dr. Jansson referred claimant to Dr. Pappademos, who saw him on September 23, 2009. Dr. Pappademos' letter of September 29, 2009, to claimant's attorney states:

It is my belief that [claimant] had some pre-existing osteoarthrosis of his right knee. He states that he was doing quite well after his right knee arthroscopy in 2008 and an intra-articular injection until the injury occurred on July 24, 2009. It is then reasonable to assume that he had some pre-existing osteoarthrosis which was permanently aggravated and intensified at the time of his injury.²

Claimant testified that he had previous right knee problems. In July 2008, he had arthroscopic surgery on his right knee, performed by Dr. Scott Goin, to take some cartilage away. While he was recuperating, he had two injections in his knee done by Dr. Snodgrass. Claimant said that before the last injection by Dr. Snodgrass, which was done approximately February 2009, his right knee was in good shape, but he had the injection for preventative measures.

Claimant said that he was on OxyContin at the time of his July 2009 accident, but it was not for his right knee problem but was for other issues. He said that the dosage of his OxyContin has been increased since his July 2009 accident. Claimant also testified that he has a limp, but it is not from his knee problem. Rather, it was the result of a previous back injury and surgery. Claimant also said he had his left knee replaced 10 years ago as a result of a work injury suffered when he worked for the State of Kansas.

Claimant had a previous workers compensation claim against Fuller Brush Company that was settled on November 26, 2008. That claim also involved an injury to his right knee. The settlement represented a 12 percent permanent partial impairment to his right lower extremity and was a strict compromise of all issues, including the issue of future medical expenses.³ Claimant said he had the two knee injections after the settlement hearing and before the July 2009 accident. Claimant said that the respondent in that case had provided him with the funding for the injections.

After the preliminary hearing, claimant was referred to Dr. John Babb by the ALJ for an independent medical examination (IME). Dr. Babb's report was filed with the Division

¹ P.H. Trans., Cl. Ex. 3 at 4.

² P.H. Trans., Cl. Ex. 3 at 1.

³ P.H. Trans., Resp. Ex. C.

on January 8, 2010. Claimant reported to Dr. Babb that he initially injured his right knee in May 2008. He said he had a right knee arthroscopy and did well after surgery and a cortisone injection. However, he had a second injury on July 2009 when he tripped over a parking block and heard and felt a pop and had immediate pain in his right knee. After review of claimant's medical records and examination, Dr. Babb diagnosed him with osteoarthritis of the right knee medial joint and patellofemoral joint. His recommendations included a total knee replacement. In his IME report, Dr. Babb stated:

The patient was doing well after his first injury and arthroscopic surgery. His previous surgery consisted of a partial medial meniscectomy, which likely led to increased arthritis of the medial compartment. Patient had been doing well after his arthroscopic surgery and was not being treated by a physician for knee pain. He then had another injury on 7/24/09, which exacerbated the underlying osteoarthritis that he had of the medial compartment of his right knee. It is within a reasonable degree of medical probability that his current complaints are causally related to his work injury of 07/24/09.⁴

Dr. Babb testified that claimant had arthritis in his right knee prior to the July 2009 injury. Further, Dr. Babb said that claimant would most likely have had the degree of arthritis shown on the MRI of July 31, 2009, at the time of the July 24, 2009, injury.⁵ He agreed that claimant would have had bone-on-bone arthritis before the date of his July 2009 accident. Dr. Babb stated that in looking at the diagnostic tests, there was no change in the physical structure of claimant's body as a result of the July 24, 2009, incident. The only difference was claimant's claim that he had increasing pain after the incident in July 2009. Dr. Babb said that anyone would have an increased risk of developing more arthritis after having undergone arthroscopy and a partial medial meniscectomy.⁶ He testified that he believed claimant's tripping episode exacerbated claimant's underlying medial compartment arthritis. It caused claimant to have more pain, which likely would cause him to need further treatment for the knee, including a total knee replacement.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

⁴ Babb Depo., Ex. 1 at 7.

⁵ Babb Depo. at 9.

⁶ Babb Depo. at 18.

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁷ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁸

Because the accident here occurred while claimant was at work, the accident occurred in the course of claimant's employment. However, the accident must also arise out of the employment before it is compensable under the Kansas Workers Compensation Act.⁹

The phrase "out of" employment points to the cause or origin of the worker's accident and requires some causal connection between the accident and the employment. An accidental injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the resulting injury. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.¹⁰

In *Hensley*¹¹, the Kansas Supreme Court adopted a risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. According to Larson's *The Law of Workmen's Compensation*, Sec. 7.04, the majority of jurisdictions compensate workers who are injured in unexplained falls upon the basis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if claimant had not been working. Although in this case claimant did not have an unexplained fall, his accident could be described as falling into the same category of a neutral risk.

K.S.A. 2009 Supp. 44-508(d) defines "accident" in part:

"Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated

⁷ K.S.A. 2009 Supp. 44-501(a).

⁸ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

⁹ See *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

¹⁰ *Supra* note 5 at Syl. ¶ 4.

¹¹ *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2009 Supp. 44-508(e) defines “personal injury” and “injury”:

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The Kansas Supreme Court, in *Boeckmann*,¹² denied workers compensation benefits, holding that

physical disability resulting from a degenerative arthritic condition of the hips which progressed over a period of years while the workman was employed is not compensable as an accident arising out of and in the course of his employment under the circumstances found to exist in the instant case.

Among the circumstances the court found to exist was that Mr. Boeckmann's disabling arthritis existed before his employment with Goodyear and that “the degenerative process will continue to progress long after his retirement.”¹³ The evidence was

that Mr. Boeckmann's hip problems, or the disabilities arising therefrom, were caused by his work at the Goodyear plant; that his employment did not cause his condition to occur; that the hip condition had been a progressive process; that increased activity was liable to aggravate the claimant's underlying problem but that almost any everyday activity has a tendency to aggravate the problem; that every time the claimant bent over to tie his shoes, or walked to the grocery store, or got up to adjust his TV set there would be a kind of aggravation of his condition. . . .

. . . .
. . . The examiner found, on what we deem sufficient evidence, that any movement would aggravate Boeckmann's painful condition and there was no difference between stoops and bends on the job or off.¹⁴

¹² *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, Syl. ¶ 2, 504 P.2d 625 (1972).

¹³ *Id.* at 736.

¹⁴ *Id.* at 738-39.

Similarly, in *Martin*,¹⁵ the Kansas Court of Appeals held that “[i]njuries resulting from risk personal to an employee do not arise out of his employment and are not compensable.”

More recently, the Kansas Court of Appeals in *Johnson*¹⁶ held:

In an appeal from the final order of the Workers Compensation Board awarding compensation for an injury suffered by an employee at the workplace, under the facts of this case substantial evidence did not support the board’s finding that the employee’s act of standing up from a chair to reach for something was not a normal activity of day-to-day living.

The court found it significant that “Johnson had a history of three or four [prior] incidents of left knee pain. Her treating physician, Dr. Jennifer Finley, testified that ‘[i]t looks like she had had years of degeneration and had some previous problems, and it was just a matter of time.’”¹⁷

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹⁸ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.¹⁹ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.²⁰

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.²¹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

¹⁵ *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, Syl. ¶ 3, 615 P.2d 168 (1980).

¹⁶ *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 3, 147 P.3d 1091, rev. denied 281 Kan. __ (2006).

¹⁷ *Id.* at 788.

¹⁸ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

¹⁹ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

²⁰ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

²¹ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.²²

ANALYSIS

The Board has concluded in prior decisions that the exclusion of normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holding in *Boeckmann*.²³ This case is distinguishable from *Boeckmann* in that the claimant herein suffered a specific accident and trauma to his knee that aggravated his preexisting condition. An aggravation caused by tripping over a fixed object is not the same as a series of aggravations from normal activities performed at work that mirror activities away from work and each of which contribute equally to the condition. Furthermore, tripping over an object is not a personal risk. There is no evidence that claimant's preexisting condition caused him to trip, rather the unsuccessful attempt to step over the object is what caused claimant to trip. This was a risk incidental to his employment.

Although Dr. Babb believed claimant would eventually require a total knee replacement even without this accident, the accident and resulting pain accelerated the need for the surgery. As such, it is compensable.

CONCLUSION

(1) Claimant's injury and current need for treatment resulted from the accident of July 24, 2009, which arose out of and in the course of his employment with respondent.

(2) The accident which occurred when claimant tripped while attempting to step over a parking block in a parking lot was not due to a personal risk or a risk not associated with the employment.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated February 15, 2010, is affirmed.

IT IS SO ORDERED.

²² K.S.A. 2009 Supp. 44-555c(k).

²³ See, e.g., *Colen v. Foodbrands Supply Chain Services, Inc.*, Docket No. 1,039,642, 2009 WL 1314330 (Kan. WCAB Apr. 9, 2009); *McCready v. Payless Shoesource*, Docket No. 1,024,685, 2008 WL 651666 (Kan. WCAB Feb. 27, 2008), *aff'd* by Kansas Court of Appeals at 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

Dated this _____ day of April, 2010.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Norman R. Kelly, Attorney for Claimant
James M. McVay, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge